U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-I-S-

DATE: JULY 19, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a business and technology consultancy, seeks to permanently employ the Beneficiary as a senior software engineer. It requests classification of the Beneficiary as a member of the professionals holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

After initially approving the petition on October 7, 2013, the Director, Texas Service Center, revoked the petition's approval on August 10, 2015. The Director concluded that the record at the time of the petition's approval did not establish the *bona fides* of the job offer or the Petitioner's ability to pay the proffered wage.

The matter is now before us on *de novo* appellate review. Because the record does not establish the Petitioner's intention to employ the Beneficiary in the offered position from the petition's priority date, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. The Director Issued the Notice of Intent to Revoke for Good and Sufficient Cause

U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval "at any time" for "good and sufficient" cause. Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was approved in error may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

A director properly issues a notice of intent to revoke cause where the record at the time of the notice's issuance, if unrebutted or unexplained, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any rebuttal evidence or explanations by a petitioner, would have warranted the petition's denial. *Id.* at 452.

In the instant case, the Director issued a notice of intent to revoke (NOIR) on June 15, 2015. The NOIR alleged that the record did not establish the Petitioner's intention to employ the Beneficiary in the offered position.[1]

The record at the time of the NOIR's issuance supported the ground of revocation. The NOIR noted that the Petitioner sought to permanently employ the Beneficiary on a full-time basis as a senior software engineer at its headquarters in Texas and at "various unanticipated worksite locations in the US." Thus, the record indicated that the Petitioner planned to contract the services of the offered position to clients for employment at their worksites.

Termination of client contracts without imminent reassignments could eliminate or reduce the offered position's workload. The record therefore did not establish the Petitioner's realistic offer of a permanent, full-time job. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977) (stating that an immigrant visa petition "seeks to establish that the employer is making a realistic job offer"); *see also Matters of Amsol, Inc.*, 2008-INA-00112, 2009 WL 2869970 (BALCA Sept. 3, 2009) (holding that evidence of substantial revenues and numerous client contracts demonstrated a labor certification employer's ability to continually employ software engineers at unanticipated client sites).

If unrebutted and unexplained, the record at the time of the NOIR's issuance would have warranted the petition's denial. The Director therefore properly issued the NOIR.

B. The Record Does Not Establish the Petitioner's Intention to Employ the Beneficiary in the Offered Position from the Petition's Priority Date

An employer "desiring and intending" to permanently employ a foreign national in the United States may file a petition on his or her behalf. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). A petitioner must intend to employ a beneficiary pursuant to the terms of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where a petitioner did not intend to employ a beneficiary as a live-in domestic worker pursuant to the accompanying labor certification).

For labor certification purposes, the term "employment" means "[p]ermanent, full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3.

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is February 1, 2013, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

[1] The NOIR also questioned the Petitioner's business status, its ability to pay the proffered wage, and the Beneficiary's qualifying experience. Because the Petitioner sufficiently addressed those issues, this decision will not discuss them.

As previously indicated, the accompanying labor certification states the Petitioner's intention to employ the Beneficiary in the offered position of senior software engineer. The labor certification states the area of intended employment as the Petitioner's headquarters in Texas and "various unanticipated worksite locations in the US." The Petitioner's intention to contract the services of the offered position to clients casts doubt on the job's permanent, full-time nature.

In response to the Director's NOIR, the Petitioner submitted evidence of its employment of the Beneficiary in the offered position since February 2015. The evidence establishes the Petitioner's intention to employ the Beneficiary in the offered position as of February 2015. But the record lacks evidence of the Petitioner's intention to employ a senior software engineer from the petition's priority date of February 1, 2013. A petitioner must establish eligibility for a requested benefit as of a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The Petitioner submitted a copy of a client contract for the services of the offered position. But the contract is dated March 23, 2015. It therefore does not support the Petitioner's intention to employ a senior software engineer from February 1, 2013.

On the Form I-140, Immigrant Petition for Alien Worker, dated August 23, 2013, the Petitioner stated its employment of three people. But copies of its federal income tax returns indicate that the corporation did not pay any salaries or wages in fiscal years 2012-13 and 2013-14.[2] Also, copies of IRS Forms 941, Employer Quarterly Tax Returns, indicate that the Petitioner had no employees during the last half of 2013 and the first three quarters of 2014. The Petitioner's non-payment of wages for more than 1 year from 2013 to 2014 suggests that it lacked permanent, full-time work for the offered position shortly after the petition's priority date.

A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. A petitioner must therefore resolve inconsistencies of record by independent, objective evidence pointing to the truth. *Ho*, 19 I&N Dec. at 591.

In our notice of intent to dismiss (NOID) of May 24, 2016, we afforded the Petitioner an opportunity to submit evidence of its intention to permanently employ a senior software engineer on a full-time basis from the petition's priority date of February 1, 2013. In response to the NOID, the Petitioner does not submit any documentary evidence of its claimed intention. Instead, it asserts that we have not considered the evidence of record in the aggregate.

The Petitioner states: "More documents such as the Franchise Tax Account Status were submitted to show that the Petitioner has been actively doing business in Texas since the priority date. For the [Administrative Appeals Office] to request additional evidence[] seems far reaching and above the preponderance of the evidence standard."

[2] The tax returns indicate that the Petitioner's fiscal year runs from April 1 to March 31.

The Petitioner appears to misunderstand the nature of the requested evidence. We sought evidence not of the Petitioner's business status, but of its intention to employ the Beneficiary in the offered position.

The record establishes the Petitioner's active business status since the petition's priority date of February 1, 2013. But, as previously discussed, the record indicates that, shortly after the priority date, the Petitioner lacked work for the offered position. The record therefore indicates that the Petitioner did not intend to permanently employ the Beneficiary on a full-time basis in the offered position from the petition's priority date.

A petitioner must establish each eligibility requirement by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). In other words, a petitioner must show that its claims are "more likely than not" or "probably" true. To determine whether a petitioner meets its burden under the preponderance standard, we consider the evidence both individually and in its totality, examining not only the evidence's quantity but also its quality (relevance, probative value, and credibility). *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989).

In the instant case, we have considered the evidence of record in the aggregate. The preponderance of the evidence does not support the Petitioner's claimed intention to employ the Beneficiary in the offered position from the petition's priority date.

For the foregoing reasons, the record does not establish the Petitioner's intention to employ the Beneficiary in the offered position. We will therefore affirm the Director's decision and dismiss the appeal.

II. CONCLUSION

The Director properly issued the notice of intent to revoke the petition's approval. The record on appeal does not establish the Petitioner's intention to permanently employ the Beneficiary on a full-time basis in the offered position from the petition's priority date. We will therefore affirm the revocation decision and dismiss the appeal.

As in visa petition proceedings, a petitioner in visa petition revocation proceedings bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act; *Ho*, 19 I&N Dec. at 589. Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-I-S-*, ID# 17054 (AAO July 19, 2016)